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**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, at 500 Pearl Street, in the City of New York, on the 20th day of September, two thousand six.

PRESENT:

HON. THOMAS J. MESKILL,
HON. CHESTER J. STRAUB,
HON. ROBERT A. KATZMANN,
Circuit Judges,

RICKY MARTIN LLOYD WALTERS,

Petitioner-Appellee,

v.

JOHN ASHCROFT, Attorney General of the United States;
IMMIGRATION AND NATURALIZATION SERVICE;
EDWARD J. MCELROY, Assistant District Director,

Respondents-Appellantss.

SUMMARY ORDER

No.04-0099-pr

Appearing for Appellant: MICHAEL R. HOLDEN, Assistant United States Attorney (Kathy S. Marks, Assistant United States Attorney, of counsel; David N. Kelley, United States Attorney for the Southern District of New York, on the brief), New York, NY

Appearing for Appellee: IRA J. KURZBAN , Kurzban, Kurzban, Weinger & Tetzeli, P.A. (Alex Solomiany, on the brief), Miami, FL

1 Appeal from the the United States District Court for the Southern District of New York
2 (Kimba M. Wood, *Judge*).
3

4 AFTER ARGUMENT AND UPON DUE CONSIDERATION, IT IS HEREBY
5 ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is
6 **VACATED**, and that the petition is converted into a petition for review and **TRANSFERRED**
7 to the Eleventh Circuit.
8

9 The Government appeals from the order of the United States District Court for the
10 Southern District of New York (Kimba M. Wood, *Judge*) granting Walters’s petition for a writ of
11 habeas corpus pursuant to 28 U.S.C. § 2241. Walters’s habeas petition challenged a final order
12 of removal entered against him by the Board of Immigration Appeals (“BIA”) in November
13 2002.

14 While this appeal was pending, the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B,
15 119 Stat. 231 (May 11, 2005) (“Act”) came into effect. Section 106(a) of the Act eliminates the
16 habeas jurisdiction of the district courts over claims challenging final removal orders, and
17 provides that petitions for review filed with the Courts of Appeal shall be the exclusive means
18 for challenging final removal orders. By its express terms, the Act is retroactive and applies to
19 cases “in which the final administrative order of removal, deportation, or exclusion was issued
20 before, on, or after” the date of enactment. *See id.* at § 106(b). Section 106(c) provides that
21 habeas petitions pending before a district court on the date of enactment be transferred to the
22 court of appeals “in which a petition for review could have been properly filed,” and treated as a
23 petition for review. *See id.* at § 106(c).

24 Although the statute does not expressly provide for the disposition of habeas petitions
25 that were pending on appeal on the date of enactment, it is now well-established that we must

1 vacate the District Court's opinion and order, and convert this appeal into a petition for review
2 under 8 U.S.C. § 1252. *See Gittens v. Meniffee*, 428 F.3d 382 (2d Cir. 2005) (per curiam);
3 *Moreno-Bravo v. Gonzales*, No. 03-2968, ___ F.3d ___, 2006 WL 2615254 (2d Cir. Sept. 12,
4 2006).

5 The Government argues that, in cases such as this where the petition for review could not,
6 had it initially been filed as a petition for review, have properly been filed in this court, we lack
7 jurisdiction to hear the converted petition; the Government argues that we are compelled, as a
8 jurisdictional matter, to transfer such petitions to the court of appeals in which the petition could
9 have been brought as a petition for review of a final order of removal. In Walters's case, because
10 his removal proceedings were completed by an immigration judge in Florida, that would be the
11 Eleventh Circuit, *see* 8 U.S.C. § 1252(b)(2), and the Government urges us to transfer the petition
12 there.

13 In *Moreno-Bravo*, we determined that § 1252(b)(2) is not a jurisdictional provision, but
14 merely a venue provision. *See Moreno-Bravo*, ___ F.3d at ___, 2006 WL 2615254 at *9. We
15 therefore have discretion, in an appropriate case, to retain a petition such as Walters'. *See id.*
16 However, under the circumstances of this case, we do not think it appropriate to do so.

17 In *Moreno-Bravo*, we retained the converted petition for two principal reasons. First,
18 because the case had been fully briefed and argued before us, and because "Moreno-Bravo,
19 having been in the custody of the Bureau of Immigration and Customs Enforcement since March
20 2001, ha[d] waited over three and a half years for a federal court to adjudicate his claims," we
21 concluded that it would be a "manifest injustice" to delay the resolution of his case, *id.* at ___,

2006 WL 2615254 at *9; and second, because it would be “futil[e]” to “waste the time of another court by transferring” the petition, given the “utter meritlessness” of Moreno-Bravo’s claims. *Id.*

Walters, unlike Moreno-Bravo, is not presently in custody. Moreover, the Government stipulated at oral argument that Walters will not be returned to custody while his petition is pending before the Eleventh Circuit, notwithstanding our vacation of the District Court’s order granting him habeas relief. We thus see no manifest injustice in transferring his petition. In addition, while we take no position on the ultimate merit of Walters’ claim, it is clearly far from a “sure loser,” *id.* (quoting *Phillips v. Sieter*, 173 F.3d 609 (7th Cir. 1997)). Indeed, Walters prevailed in the District Court. While he may not ultimately prevail on his petition for review, it is clearly not futile to transfer the petition to the circuit in which it properly belongs.

For the foregoing reasons, we vacate the District Court’s opinion and order, we convert Walters’s habeas petition into a petition for review, and we transfer it to the Eleventh Circuit.

FOR THE COURT:

ROSEANN B. MACKECHNIE, CLERK

BY